

*Petition for
rehearing
same.*

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 420

BEN ADLER SIGNS, INCORPORATED, AND ADLER
SIGN LETTER COMPANY, INCORPORATED,
Petitioners,

vs.

WAGNER SIGN SERVICE, INCORPORATED,
Respondent.

PETITION FOR REHEARING OF A PETITION FOR WRIT OF
CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

ARTHUR A. OLSON,
Counsel for Petitioners.

ALBERT F. MECKLENBURGER,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. _____

BEN ADLER SIGNS, INCORPORATED, AND ADLER
SIGN LETTER COMPANY, INCORPORATED,

Petitioners,

vs.

WAGNER SIGN SERVICE, INCORPORATED,

Respondent.

PETITION FOR REHEARING OF A PETITION FOR
WRIT OF CERTIORARI TO THE CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

*To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

Respondent brought suit against Petitioners and one of their customers for alleged infringement of two patents¹ pertaining to silhouette signs used on the marquees of moving picture theatres. Petitioners in turn sued Respondent for alleged infringement of their patent² relating also to such signs. The cases were consolidated for trial. Only the earlier of Respondent's two patents is involved in this Petition.

The Trial Court³ held all of the patents valid and infringed but expressed grave doubt as to the correctness of said ruling. The Court further expressed the opinion

1. Nos. 2,048,040 and 2,119,430.

2. No. 2,038,978.

3. The District Court of the United States, Northern District of Illinois, Eastern Division.

that "these patents are either all good or all bad" (R., 180, Petition for Certiorari, p. 5).

The Circuit Court of Appeals for the Seventh Circuit found the Respondent's earlier patent only was valid and infringed but also expressed doubt as to the correctness of that finding (R., 440, Petition for Certiorari, p. 4).

On October 28th last, this Court denied Petition for Certiorari.

There is no conflict of decisions as between different Circuits on the question of the validity and infringement of the patent. Other than the parties to this litigation, however, practically no one else is engaged in the manufacture and sale of signs of the type involved. In this situation, there is only the remotest possibility that any other Circuit Court of Appeals will ever be afforded the opportunity of passing upon the validity of this patent.

The amount of the investment involved in any single sign is small. It does not exceed a few hundred dollars, as appears from advertisements of record (R., 249). Furthermore, the Respondent does not derive its profit from the use but from the manufacture and sale of signs. Accordingly, there could be no recovery against a user of Petitioners' signs.⁴

If suit were brought against such user in another Circuit, the defendant could not afford the luxury of a defense and Petitioners, defending in the user's behalf, could not relitigate the question of validity because of estoppel by judgment. It is practically impossible, therefore, that any other Circuit Court of Appeals will ever be called upon to adjudicate this patent.

Users of Petitioners' signs are to be found in many cities in various parts of the country. Since the date on which the decision of the Circuit Court of Appeals was

4. *Stebler v. Riverside Heights Orange Growers' Ass'n, et al.*, 214 Fed. 550.

rendered,⁵ however, the one and only user whom Respondent has brought suit against is located at Chicago in the Seventh Circuit.⁶ The patent was sustained in that Circuit and Respondent has studiously and deliberately avoided submitting it to the possibility of an adverse adjudication in any other Circuit.

These circumstances, it is thought, should take this case outside the general rule requiring a conflict of decisions as a prerequisite to the grant of a Writ of Certiorari in patent cases and place it in the category of cases which will be reviewed in the absence of such conflict. This is a case in which the validity of the patent is plainly questionable, practically the entire manufacturing industry (if not all of it) is located in the Seventh Circuit, the possibility of the patent ever being litigated in any other jurisdiction is extremely remote, and a novel and important legal question is involved.

It is submitted that the case is strikingly parallel, in so far as the grounds presented for the grant of the writ are concerned, to *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50.

Other cases believed to sustain jurisdiction are:

Mackay Radio & Telegraph Co. v. Radio Corporation of America, 306 U. S. 86, 89.

Leitch Manufacturing Co. v. Barber Co., 302 U. S. 458.

Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464.

Altoona Publix Theatres, Inc. v. American Tri-Ergon Corp., 294 U. S. 477.

Carbice Corporation of America v. American Patents Development Corp., 283 U. S. 27.

DeForest Radio Co. v. General Electric Co., 283 U. S. 664.

5. April 25, 1940.

6. *Wagner Sign Service, Inc. v. Midwest News Reel Theatres, Inc.*, Civil Action No. 1880.

I.

From the trade journals of the theatre world⁷ (portions of which are in evidence, R., 103, 233, 235, 237, 273), it is apparent that the parties to this litigation are the only nationally advertised concerns which manufacture silhouette letters of the notched flange (adjudged infringing) type. Only one other national advertiser⁸ makes silhouette letters for use on theatre marquees. Its letters are not of the notched flange type but are suspended by hooks on their backs, very much after the fashion of the prior art patent to Standish, No. 1,884,335 (Petition for Certiorari, p. 9).

If anyone else makes silhouette letters of any type for this use, it is only some local sign-maker somewhere, unknown to Petitioners and not a factor in the business.

It is respectfully suggested, therefore, that, in the interest of justice and in view of the remoteness of the possibility that the patent will ever be passed upon in any other Circuit, this Honorable Court should not refuse to review this case at this time.

II.

With regard to the dubious validity of the patent, and Respondent's misuse of the patent grant to intimidate and stifle legitimate competition, reference is again made to the Petition. In addition, it is respectfully suggested that the supposed "inventive thought" involves nothing more elevating or inspiring than the mere suspending of letters and characters from rods or wires in front of a translucent, glass background, by means of notches cut in the backs of the letters and characters; that illuminated signs comprising a box containing a light and having one side

7. "Signs of the Times"; "Box Office"; "The Exhibitor"; "Better Theatres" and "National Sign Journal."

8. The Artkraft Sign Co., Lima, Ohio.

enclosed by a translucent, glass panel are not claimed to have been new with the patent in suit; that the practice of cutting notches in the back of devices of all sorts in order to hang them up on wires, rods, strings, ropes, nails, hooks, and similar things dates back to very early times; and that the supposed inventive thought of this patent is wholly lacking in novelty and in that spark of genius which distinguishes invention from mere mechanical skill.

In this situation, it is further respectfully suggested that the ends of justice can not be served unless a review of the case is granted at this time.

Wherefore, Petitioners respectfully pray that their Petition be reconsidered and that the Writ of Certiorari be issued as prayed for therein.

Respectfully submitted,

ARTHUR A. OLSON,

Counsel for Petitioners.

ALBERT F. MECKLENBURGER,

Of Counsel.

I hereby certify that the foregoing Petition for Rehearing is filed in good faith and not for purpose of delay.

ARTHUR A. OLSON.